

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Streamlining Deployment
of Small Cell Infrastructure
by Improving Wireless Siting Policies

WT Docket No. 16-421

COMMENTS BY THE CITY OF DUBLIN, OHIO

Dana McDaniel
City Manager
City of Dublin
5200 Emerald Parkway
Dublin, OH 43017
(614) 410-4400

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On July 14, 2016, the Federal Communications Commission (“FCC” or “Commission”) unanimously voted to open high-band spectrum for 5th generation (“5G”) wireless expansion.¹ This action is projected to greatly impact connected devices and the Internet of Things (“IoT”). The City of Dublin (the “City” or “Dublin”) recognizes that widespread 5G and IoT deployments are not only imminent, but essential in order for communities to experience the full benefits of being a “smart city,” and municipalities that plan accordingly can be at the forefront of this revolution.

While this new technology enables wireless carriers to provide improved voice and data services, it also requires the proliferation of smaller, more numerous towers and antennas. As the FCC recognized in its Public Notice on Streamlining Deployment of Small Cell Infrastructure,

[t]his creates a dilemma . . . localities play an important role in preserving local interests such as aesthetics and safety. At the same time, the Commission has a

¹ FED. COMMUNICATIONS COMM’N (2016), *available at* <https://www.fcc.gov/news-events/events/2016/07/july-2016-open-commission-meeting>.

statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless service to consumers throughout the United States.²

Municipalities are naturally protective of their right-of-way (“ROW”) and the aesthetics of their communities - aesthetics are an integral part of a city’s planning and development process and localities spend a significant amount of money each year to maintain them. As a result, communities may caution the deployment of certain infrastructure in the local right-of-way, despite the need for modern communications for end-user residents and businesses.

To govern this balance, the City of Dublin enacted Chapter 98 of its Code of Ordinances to create a comprehensive right-of-way management ordinance and Chapter 99 to provide wireless communications regulations.³ Chapter 99 of Dublin’s Code of Ordinances applies to “[a]ll towers, antenna support structures, and wireless communications facilities, any portions of which are located within the city.”⁴ The purpose of the chapter is to “regulate the placement, construction, and modification of towers and wireless communications facilities to protect the health, safety and welfare of the public, while at the same time not unreasonably interfering with the development of a competitive wireless communications marketplace in the city.”⁵ The chapter institutes reasonable restrictions as to the location, aesthetics, and placement of towers and wireless communications facilities, and encourages wireless communications companies to work with the City of Dublin to identify locations that meet the needs of both the providers and the community.

² *Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421 (WTB 2016) (Public Notice).

³ DUBLIN, OH., CODE OF ORDINANCES, *available at* [http://library.amlegal.com/nxt/gateway.dll/Ohio/dublin/cityofdublinohiocodeofordinances?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:dublin_oh](http://library.amlegal.com/nxt/gateway.dll/Ohio/dublin/cityofdublinohiocodeofordinances?f=templates$fn=default.htm$3.0$vid=amlegal:dublin_oh).

⁴ DUBLIN, OH., CODE OF ORDINANCES ch. 99.03 (2013).

⁵ DUBLIN, OH., CODE OF ORDINANCES ch. 99.01 (2013).

I. THE PETITION FOR DECLARATORY RULING FROM MOBILITIE, LLC OVERLY GENERALIZES FEES CHARGED BY COMMUNITIES FOR THE DEPLOYMENT OF INFRASTRUCTURE ON PUBLIC RIGHTS-OF-WAY.

In its Petition for Declaratory Ruling to the FCC, Mobilitie claims that many localities request “multiple, exorbitant fees that unlawfully discriminate against wireless technology and impair new or improved service” and that many local governments impose fees that “appear to be set to recover what localities believe the ‘market’ rate is for the use of their rights-of-way, rather than to recover ‘fair and reasonable compensation’ for localities’ expenses.”⁶

The City of Dublin continually seeks to align its actions regarding the use of City right-of-way with Ohio Revised Code § 4939, which governs the use of the municipal public way in Ohio. According to section 4939.02, it is the public policy of Ohio to do all of the following:

- (1) Promote the public health, safety, and welfare regarding access to and the occupancy or use of public ways, to protect public and private property, and to promote economic development in this state;
- (2) Promote the availability of a wide range of utility, communication, and other services to residents of this state at reasonable costs, including the rapid implementation of new technologies and innovative services;
- (3) Ensure that access to and occupancy or use of public ways advances the state policies specified in sections 4927.02 [“Telecommunications – Alternative Regulation”], 4928.02 [“Competitive Retail Electric Service”], and 4929.02 [“Alternate Rate Plan for Natural Gas Companies; Certification of Governmental Aggregators and Retail Natural Gas Suppliers”] of the Revised Code;
- (4) Recognize the authority of a municipal corporation to manage access to and the occupancy or use of public ways to the extent necessary with regard to matters of local concern, and to receive cost recovery for the occupancy or use of public ways in accordance with law;
- (5) Ensure in accordance with law the recovery by a public utility of public way fees and related costs;
- (6) Promote coordination and standardization of municipal management of the occupancy or use of public ways, to enable efficient placement and operation of

⁶ Petition for Declaratory Ruling, *Promoting Broadband for All Americans by Prohibiting Excessive Charges for Access to Public Rights of Way* (filed Nov. 15, 2016) [hereinafter *Mobilitie Petition*].

structures, appurtenances, or facilities necessary for the delivery of public utility or cable services;

(7) Encourage agreement among parties regarding public way fees and regarding terms and conditions pertaining to access to and the occupancy or use of public ways, and to facilitate the resolution of disputes regarding public way fees.

(B) This policy establishes fair terms and conditions for the use of public ways and does not unduly burden persons occupying or using public ways or persons that benefit from the services provided by such occupants or users.⁷

Recently adopted Ohio Senate Bill 331 updated section 4939.02 to further include “[e]xpeditious the installation and operation of micro wireless facilities in order to facilitate the deployment of advanced wireless service throughout the state.”⁸

Section 4939 defines a "public way fee" as “a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way.”⁹ The section restricts cost recovery to actual and direct fees associated with the use of the public right-of-way:

Public way fees levied by a municipal corporation shall be based only on costs that the municipal corporation both has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way. The costs shall be reasonably and competitively neutrally allocated among all persons occupying or using public ways owned or controlled by the municipal corporation . . . No public way fee shall include a return on or exceed the amount of costs reasonably allocated by the municipal corporation to such occupant or user or pursuant to any reasonable classification of occupants or users.¹⁰

By requiring fees to be based on costs incurred and be demonstrable, Ohio law clearly promotes the “‘fair and reasonable compensation’ for localities’ expenses” that Mobilite encourages in its Petition. Dublin’s right-of-way management ordinance pre-existed section 4939 and is

⁷ OHIO REV. CODE § 4939.02 (2002).

⁸ 2016 Ohio Laws File 148 (Sub. S.B. 331).

⁹ OHIO REV. CODE § 4939.01 (2012).

¹⁰ OHIO REV. CODE § 4939.05(C) (2002).

grandfathered in under the provision. Despite this, according to Dublin’s Code of Ordinances, fees for right-of-way use are to “remain reasonable and non-discriminatory.”¹¹ Further, the City has waived these fees for telecommunications providers on every occasion. Mobilitie’s assertions regarding “exorbitant fees” are sweeping statements that are not representative of the sensible approaches implemented by many states and cities nationwide, including Dublin.

II. THE DELAYS IN LOCAL PERMITTING AND ZONING PROCESSES FOR SMALL CELL BUILDS ON PUBLIC RIGHTS-OF-WAY ARE ATTRIBUTABLE TO THE SIZE OF THE TOWERS IN MOBILITIE’S APPLICATIONS.

According to the Public Notice, “some industry participants assert that local permitting and zoning processing for both new tower and small cell builds continue to encounter frequent delays.”¹² The Commission projects that the review process for small cell applications should be faster than the review for macro facilities; yet, the Commission seeks comment on how it should define “small cell.”¹³

Mobilitie recognizes in its Petition that “[r]ights of way have always served the public interest by enabling citizens to obtain and use essential services, such as electricity, telephone, gas, water, and transportation.”¹⁴ Decades of providing these essential services leads to many structures already utilizing local rights-of-way, and the ongoing provision of such services requires detailed review of applications for cell tower and wireless telecommunications facilities in order to ensure that they will not interfere with current right-of-way users.

¹¹ DUBLIN, OH., CODE OF ORDINANCES ch. 98.07(G) (1997).

¹² Public Notice, *supra* note 2, at *5.

¹³ *Id.* at *8.

¹⁴ *Mobilitie Petition*, *supra* note 6, at 2.

In Dublin, wireless communications facilities are subject to a comprehensive review by an Administrative Review Team.¹⁵ The Administrative Review Team consists of the Director, City Engineer, Fire Chief, Economic Development Manager, Parks and Open Space Director, Police Chief, and Chief Building Official, or their representatives, and any other members appointed by the City Manager.¹⁶ The Administrative Review Team is required to approve, approve with conditions, or deny an application within only 28 days of its submission.

While the federal definition of small cell is unclear, Mobilitie has approached municipalities with plans to construct towers in the right-of-way to be used for DAS that range from 70 to 120 feet in height.¹⁷ Towers of such size cannot be considered “small,” especially in light of the fact that they have been proposed for location in the public right-of-way. Stated simply, reviewing Mobilitie’s applications may take longer than other small cell requests because they are different, larger structures.

III. MOBILITIE MISREPRESENTS THE STATE OF WIRELESS BROADBAND AND OVERLOOKS SEVERAL OPTIONS TO SMALL CELL DEPLOYMENT THAT DO NOT REQUIRE USE OF LOCAL RIGHTS-OF-WAY.

Although not requested by the Commission, there are several additional discrepancies in the Mobilitie Petition that the City of Dublin seeks to address in these Comments.

¹⁵ DUBLIN, OH., CODE OF ORDINANCES ch. 99.06(A)(1)(a) (2013).

¹⁶ DUBLIN, OH., CODE OF ORDINANCES ch. 99.06(A)(1)(b) (2013).

¹⁷ “Carriers and other wireless providers regularly approach municipalities with plans to construct a variety of wireless networks. But Mobilitie is approaching municipalities trying to deploy mini cell towers in public rights of way under the “small cell” moniker. That, despite the towers were going to be used for DAS and range from 70 to 120 feet in height, which are definitely not small cells.” Ernest Worthman, *Mini-cell Towers Shouldn’t Be Passed as Small Cells*, ABOVE GROUND LEVEL MEDIA GROUP (Aug. 30, 2016), <http://www.aglmediagroup.com/mini-cell-towers-shouldnt-be-passed-as-small-cells/>.

First, Mobilitie states that “many citizens who lack access to robust wireless broadband reside in urban areas, where small cell deployments along rights-of-way offer the optimal, if not the only, solution to making broadband available to meet increasing demand.”¹⁸ The City of Dublin is an urban community, and Mobilitie’s statement is simply not accurate – it is continually citizens who reside in rural areas that lack access to robust wireless access. Connect Ohio is a nonprofit organization in Ohio that, since 2007, has served as the state’s comprehensive broadband repository and provided this data to inform state and local strategies to improve and expand broadband throughout the state.¹⁹ Connect Ohio collects and maps data to track the progress of high-speed wireline and wireless access in Ohio. According to Connect Ohio, 100% of Ohio’s urban areas have access to mobile wireless at speeds of 10 Mbps upload/ 1 Mbps download, while 92.66% of rural Ohio areas have access to this speed.

Second, Mobilitie asserts that using local rights-of-way “reduces the transaction costs providers incur to negotiate with private landowners for access to individual buildings, which can involve hundreds of different leases across a geographic area.” Although this is accurate, Mobilitie’s Petition overlooks several options to small cell deployment that do not require use of the right-of-way. For example, developers could utilize existing towers or facilities to co-locate their equipment, such as cellular towers, street light poles, tall buildings, or water storage tanks, and/ or consider public parks or open green spaces to place wide or tall towers. In Dublin, alternative tower structure options include “man-made trees, bell steeples, light poles, power poles, and similar alternative-design mounting structures or other buildings or structures that are

¹⁸ *Mobilitie Petition*, *supra* note 6, at 3.

¹⁹ CONNECT OHIO, <http://www.connectohio.org> (last visited Feb. 15, 2017).

intended to camouflage or conceal the presence of antennas, towers, and other wireless communications facilities.”²⁰

IV. CONCLUSION

The City of Dublin cautions the Federal Communications Commission from placing too much stock in Mobilitie’s assertions in its Petition for Declaratory Ruling. As expressed in these Comments, Mobilitie overly generalizes the fees charged by communities and application approval times for the deployment of infrastructure on public rights-of-way. Very simply, Mobilitie’s Petition makes blanket assertions that are not characteristic of all communities, including the City of Dublin.

Respectfully submitted,

A handwritten signature in black ink that reads "Dana McDaniel" with a stylized flourish at the end.

Dana McDaniel
City Manager
City of Dublin
5200 Emerald Parkway
Dublin, OH 43017
(614) 410-4400

March 7, 2017

²⁰ DUBLIN, OH., CODE OF ORDINANCES ch. 98.04 (2013).